STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Sage Telecom, Inc.	)	
	)	**03-0570**
Petition for Arbitration of an	)	
Interconnection Agreement with	)	
Illinois Bell Telephone Company d/b/a	)	
SBC Illinois under Section 252(b) of the	)	
Telecommunications Act of 1996	)	

INITIAL BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

Michael J. Lannon
Brandy D.B. Brown
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

Counsel for the Staff of the
Illinois Commerce Commission

November 3, 2003

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Sage Telecom, Inc.	)	
	)	**03-0570**
Petition for Arbitration of an	)	
Interconnection Agreement with	)	
Illinois Bell Telephone Company d/b/a	)	
SBC Illinois under Section 252(b) of the	)	
Telecommunications Act of 1996	)	

INITIAL BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Section 761.400 of the Commission's Rules of Practice (83 Ill. Adm. Code 761.400), respectfully submits its Initial Brief in the above-captioned matter.

I. Introduction

This proceeding was initiated pursuant to a Petition for Arbitration (the "Arbitration Petition") under to Section 252(b) of the Telecommunications Act of 1996 ('1996 Act"), 47 U.S.C. § 252(b), to establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC Illinois" or "SBC"), filed on September 17, 2003 by Sage Telecom, Inc. ("Sage"). The Arbitration Petition included a draft of the Interconnection Agreement ("ICA") under negotiation by the parties, identified one (1) unresolved issue with respect to such Interconnection Agreement, and detailed the position of each of the parties with respect to the issue.

On September 24, 2003, the Administrative Law Judge ("ALJ"), held a pre-hearing conference. At the hearing, the parties agreed to an expedited discovery turnaround, the ALJ set a schedule for pre-filed testimony, and the ALJ continued the hearings until October 22 and 23, 2003.

On October 1, 2003, Sage witness filed direct testimony (Sage Ex. 1.0). On October 10, 2003, SBC Illinois filed its Response to the Arbitration Petition ("Response to the Arbitration Petition"). In its Response to the Arbitration Petition, SBC identified an additional arbitration issue ("SBC Issue 1"). SBC Illinois witnesses Mr. Roman Smith (SBC Illinois Ex. 1.0) and Ms. June A. Burgess (SBC Illinois Ex. 2.0) filed direct testimony that same day. On October 15, 2003, Staff witnesses Dr. James Zolnierek (Staff Ex. 1.0) and Mr. Jeffrey H. Hoagg (Staff Ex. 2.0) filed direct testimony. On October 21, 2003, Sage witness Ms. Stephanie G. Timko filed rebuttal testimony (Sage Exs. 2.0 and 2.0P) and SBC witness Mr. Roman Smith (SBC Illinois Ex. 1.1) filed rebuttal testimony.

Evidentiary hearings were initially scheduled to be held in Chicago, Illinois on October 22, 2003. In light of Sage witness Ms. Stephanie G. Timko rebuttal testimony (Sage Exs. 2.0 and 2.0P) filed the day before on October 21, 2003, SBC Illinois came to the evidentiary hearing scheduled for October 22, 2003, with a substantive concession, which was reflected in SBC Illinois witnesses Mr. Roman Smith's Revised direct testimony (SBC Illinois Ex. 1.0 Revised). The evidentiary hearing scheduled for October 22, 2003, was postponed until October 23, 2003, to allow the Sage and SBC Illinois to determine if they could settle the open issues in light of SBC Illinois' concession.

Sage and SBC Illinois, however, were unable to settle the open issues despite their respective diligent efforts to do so. Consequently, evidentiary hearings were held on October 23, and 27, 2003, with the parties directing cross-examination of pre-filed direct and rebuttal testimony. The ALJ asked various witnesses questions throughout the proceeding. At the conclusion of the October 27, 2003 evidentiary hearing, the parties reviewed the briefing schedule which provided for the filing of simultaneous initial briefs on November 3, 2003, reply briefs on November10, 2003, an ALJ proposed arbitration decision on November 24, 2003, and briefs on exceptions on December 2, 2003. The parties agreed to waive reply brief on exceptions. The record was then marked "Heard and Taken". Tr. 447-48.

II. The Issues and Positions of the Parties

Sage Issue 1: Can SBC impose on Sage, as a precondition to providing Interconnection, an obligation that Sage act as the billing and collection agent for third-party billed calls originated by SBC customers?

Summary of Sage's Position

Sage argues that SBC cannot compel Sage to execute a billing and collection agreement for Incollect calls. Sage's fundamental position is articulated in ¶ 1 of the Petition for Arbitration as follows:

> Sage respectfully requests that the Commission approve the negotiated terms of interconnection between SBC and Sage, and that the Commission adopt the parties agreed Interconnection Agreement. Through negotiations over the course of several months, the parties were able to come to agreement on all terms of the interconnection agreement. Notwithstanding that the parties have agreed to the terms of an Interconnection Agreement pursuant to Sections 251 and 252, SBC refuses to execute the Interconnection Agreement, holding the signing of the Interconnection Agreement as hostage to compel Sage to enter into a separate billing and collection agreement for third-party billed calls placed by SBC customers to a Sage customer.

Despite Sage's position, as articulated above, that "all terms of the interconnection agreement" have been agreed to and that SBC Illinois is holding the

Interconnection Agreement as "hostage" in order to force Sage into a "separate billing and collection agreement," Sage witness Ms. Timko testified on Rebuttal that:

> Sage has agreed to Section 27.16, which defines Incollect calls, and imposes an obligation on Sage to bill and collect SBC's Incollect call traffic. Again, Sage has no objection to doing this. The real issue is that SBC demands, through its proposed 13-State ABS Appendix, that Sage guarantee all or a portion of this revenue for SBC calls."
>
> Timko Rebuttal (Sage Ex. 2.0), at 3:

Sage witness Ms. Timko, in her rebuttal testimony, further stated that if the Commission rejected Sage's proposed language to be added to section 6.3.4.1 of the proposed Interconnection Agreement,[1] such a rejection "would be acceptable" to Sage if the Commission addresses the "real issue" in this arbitration. Timko Rebuttal (Sage Ex. 2.0), at 5. Ms. Timko frames the "real issue" as "what is Sage's liability if any, when an SBC ABS [Alternatively Billed Services] Customer refuses to pay the charges for SBC's competitive ABS charge." *Id*.

Sage counsel, however, at the hearing redefined Sage's positions as follows:

> [Sage] believe that there should be no billing and collection terms in an interconnection agreement. However, if the Commission finds that there should be some billing and collection terms, they are proposing that Section 27.16 and Section 6 as set forth in the petition be the adopted language, and that no additional appendices be adopted. If the Commission then concludes that there should be additional billing and collection terms via an appendix also added to the * * * interconnection agreement, they would propose Sage's Exhibit No. 3 to the petition with the - to be included or revised to be included Option 1 in Mr. Smith's revised appendix.

Tr. at 20-21.

In support of its position, Sage cites to a 1986 FCC decision that found "billing and collection services provided by local exchange carriers are not subject to regulation

[1] See Exhibit 2 to the Petition for Arbitration. Sage's proposed language to be added to section 6.3.4.1 provides, in full, that "CLEC will not be liable for Alternatively Billed service".

under Title II of the [Federal Communications] Act." Petition for Arbitration, ¶ 15. *citing to See In the Matter of Detariffing of Billing and Collection Services*, FCC Docket No. 85-88, Report and Order, 102 FCC2d 1150, ¶ 32 (rel. January 29, 1986) ("*FCC B&C Order*"). Based upon the findings in the *FCC B&C Order*, Sage argues that "[b]ecause billing and collection is an unregulated service that isn't even subject to the scope of the Federal Communications Act, nor the jurisdiction of the Federal Communications Commission, there is no sustainable reason why an interconnection agreement negotiated pursuant to the Act and detailing the interconnection of regulated services between Sage should be bogged down with SBC's unreasonable demands." Petition for Arbitration, ¶ 17; Timko Direct, at 10-11. Sage appears to argue that the Commission does not have the authority (or something akin to jurisdiction) to decide this issue in SBC Illinois' favor or to craft some sort of compromise resolution. Thus, under Sage's legal theory, the Commission is limited to accepting Sage's position on Sage Issue 1 (prohibiting the ICA from containing terms and conditions of ABS) or adopting one of Sage's alternative positions contained in Sage Issue 2.

Summary of SBC Illinois' Position

SBC, on the other hand, argues that the ICA at issue "contains terms and conditions governing the provision of UNE-P." SBC Illinois' Response To Sage's Petition For Arbitration, p. 3, ¶ 4. ABS traffic, according to SBC Illinois, is an "important aspect of the local dial tone service" that Sage provides to its customers, which "is carried over the UNE-P and terminates at the UNE switch port of the UNE platform used by Sage to provide service to its own customers." *Id*. SBC Illinois also notes that "as a UNE-P provider, Sage, not SBC Illinois, has control over the actual ability of Sage end users to authorize and accept ABS calls and associated charges, which, SBC Illinois, contends are all reasons supporting an Interconnection Agreement containing terms and conditions regarding the "billing, collection and settlement of charges for ABS calls and associated charges." *Id*. Finally, SBC Illinois notes that its proposed ABS Appendix "is just that – an appendix to the ICA, not a separate agreement." *Id*., ¶ 4.

Staff's Position

As Staff understands Sage 's position on its Issue 1, this issue requires a legal analysis of whether the *FCC B&C Order* prohibits the Commission from including in the ICA provisions containing billing and collection terms and conditions for ABS. First, however, Staff will provide the Commission a policy-based analysis in order to address issues raised by Sage's presentation of Sage Issue 1 to the Commission.

a. Staff's Policy Position

Staff witness Dr. Zolnierek testified that Sage Issue 1 is "moot" because Sage presents the Commission an ICA (found in Ex. 2 to the Petition for Arbitration) that it asserts contains "…the terms of the undisputed interconnection agreement" between Sage and SBC for Illinois. Dr. Zolnierek Verified Statement, at 5, *citing to* Sage Petition for Arbitration, at ¶ 1, footnote 2. Sage, moreover, requests the Commission to "adopt" what Sage characterizes as the "agreed Interconnection Agreement."[2] *Id*., at 5. This ICA, however, includes certain rates, terms, and conditions that govern Sage's billing and collection of Incollect calls.[3] *Id*., at 5-6.

[2] "Sage respectfully requests that the Commission approve the negotiated terms of the interconnection between SBC and Sage, and that the Commission adopt the parties agreed Interconnection Agreement." Petition at ¶ 1.

[3] Petition, Exhibit 2, Article XXVII (Billing).

Therefore, Sage has, based on the Petition, agreed to execute a billing and collection agreement for Incollect calls and included certain rates, terms, and conditions for the billing and collection of Incollect calls in the ICA that it asks the Commission to approve under its Section 252(b) authority in this proceeding despite its position that such billing and collection terms and conditions have been deregulated by the FCC and, thus, cannot be imposed upon them. At the same time, moreover, Sage also asks the Commission to approve its proposed language for section 6.3.4.1. Sage's proposed language to be added to section 6.3.4.1 provides, in full, that "CLEC will not be liable for Alternatively Billed Services". As SBC Illinois accurately noted, Sage's proposed language "reflects [its] position that it should not bear any financial responsibility for actually collecting charges for ABS services properly billed to its customers." SBC Illinois Response to the Petition for Arbitration, at 2, ¶ 2. SBC Illinois, however, and contrary to Sage's assertions that the ICA contained in Ex. 2 to the Petition for Arbitration was agreed to by both parties, has not agreed to Sage's proposed language to be included in section 6.3.4.1. Far from agreeing to Sage's proposed language in section 6.3.4.1, SBC Illinois has proposed its own ABS Appendix to the ICA, which offers Sage three distinct options under which Sage would bear some varying level of financial responsibility for collecting ABS charges properly billed to Sage customers. *Id.*, at 3, ¶ 3.

Sage, accordingly, appears to be requesting that the Commission order SBC Illinois to accept those rates, terms, and conditions regarding billing and collection that Sage finds acceptable (section 6.3.4.1), but to reject those that Sage finds unacceptable

(SBC's proposed ABS Appendix).[4] As noted above, however, Sage subsequently revised its position by requesting that the Commission strip billing and collection language from the Exhibit 2 language, which language Sage, in its Petition, requested the Commission approve. Tr. 20-21.

Dr. Zolnierek testified (prior to Sage counsel's "clarification" of Sage's position) that as a matter of good public telecommunications policy, the Commission should not force SBC Illinois (or Sage) to accept only mutually agreeable rates, terms, and conditions for Incollect billing and collection, while ignoring the contested language found in section 6.3.4.1 and the ABS Appendix that are not mutually agreed to. Dr. Zolnierek Verified Statement, at 6. Because Sage did not propose an interconnection agreement that excludes rates, terms, and conditions for billing and collection of Incollect calls, the Commission has not been presented with proposed language that excludes billing and collection of Incollect calls from the 252(b) interconnection agreement. Thus, while the Commission may or may not find that Sage should be entitled to remove all rates, terms, and conditions related to Incollect calls from the contract, Sage has still not offered proposed language consistent with such a finding. In fact, Dr. Zolnierek testified that if the Commission were to order the removal of all rates, terms, and conditions related to Incollect calls from the contract, then the Commission would need to reject Sage's request for the Commission to approve the "agreed Interconnection Agreement"[5] and would instead need to order the parties to remove

[4] This Sage position is explicitly defined by Witness Stephanie G. Timko, who states: "Sage has several concerns about SBC's attempt to implement *additional* terms and conditions related to "Incollect" calls that are not found in the negotiated Interconnection Agreement." Direct Testimony of Stephanie G. Timko on Behalf of Sage Telecom, Inc. ("Timko Direct") at 8 (emphasis added).
[5] Petition at ¶ 1.

what Sage characterizes as mutually agreeable language regarding the rates, terms, and conditions for Incollect calls. Dr. Zolnierek Verified Statement, at 7.

Staff, accordingly, under these circumstances, cannot recommend that the Commission adopt Sage's proposal for resolution of Sage Issue 1. Similarly, under these circumstances, and also based upon Staff's legal analysis found immediately below, Staff recommends that the Commission order the parties to include in their interconnection agreement *reasonable* terms and conditions governing the parties' arrangements for the billing, collection and settlement of charges for ABS traffic. Dr. Zolnierek Verified Statement, at 6.

b. The *FCC B&C Order* Is Not Relevant To The Commission's Resolution Of Sage Issue 1

It is Staff's position that the FCC's deregulation of Billing and Collection B&C agreements between IXCs and ILECs is not relevant to Sage Issue 1 in this interconnection arbitration under section 252 of the Telecommunications Act of 1996 ("TA 96"). Staff disagrees with Sage's legal position on Sage Issue 1 for the following reasons.

First, the *FCC B&C Order,* which is the cornerstone of Sage's legal position on Sage Issue 1, was decided by the FCC (rel. January 29, 1986) prior to the enactment of TA 96, which was enacted on February 8, 1996. The *FCC B&C Order*, furthermore, addressed issues arising out of the breakup or, more precisely, the divestiture by AT&T of its Regional Bell Operating Companies ("RBOC") offspring. Under the Modified Final Judgment, which determined the terms of the AT&T divestiture, AT&T chose (with some prodding by the Justice Department) to divest itself of the RBOCs, which provide primarily local telecommunications service, and retain AT&T as an Interexchange Carrier ("IXC") providing primarily long distance services. *See United States v. AT & T*, 552 F. Supp. 131, 226 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983). The *FCC B&C Order*, consequently, addressed billing and collection agreements between IXCs and the RBOCs and other Incumbent Local Exchange Carriers ("ILECs") in the immediate post AT&T divestiture telecommunications regulatory environment; it does not, and could not, address issues relevant to a post TA 96 telecommunications regulatory environment under a section 252 Interconnection Agreement arbitration.[6]

Second, Section 252 of TA 96 allows any party to a section 252 negotiation to petition the Commission "to arbitrate any open issues." 47 USC 252(b)(1). More to the point, Section 252 also requires the Commission to "resolve *each* issue set forth in the petition and the response." 47 USC 252(b)(4)(C) (emphasis added). The only additional requirement that TA 96 places upon the Commission in deciding each open issue is that the Commission's decision must "meet the requirements of section 251." 47 USC 252(e)(2)(B). Staff finds nothing in section 251 prohibiting an Interconnection Agreement from including terms and conditions regarding the billing, collection and settlement of charges for ABS calls and associated charges of ABS. Sage, moreover, has not argued that any provision of section 251 would prohibit the Commission from adopting SBC Illinois' proposed ABS Appendix.

Third, both the FCC Common Carrier Bureau and a federal district court in Minnesota rejected arguments similar to Sage's in the context of section 252 arbitration

[6] TA 96, of course, amended the federal Communications Act of 1934, under which authority (specifically, Title II) Sage contends the FCC deregulated billing and collection.

proceedings. The FCC Common Carrier Bureau, standing in the place of the Virginia Commission, rejected an analogous Verizon argument that the FCC had no authority to include alternative dispute resolution ("ADR") language in a section 252 Interconnection agreement. In reaching its decision, the FCC Common Carrier Bureau stated the following:

> We disagree with Verizon that we lack authority to require the inclusion of an alternative dispute resolution provision in this agreement. The Act gives us broad authority, standing in the shoes of a state commission, to resolve issues raised in this proceeding. The only limitations that section 252(b)(4)(C) and (c) place upon any individual issue addressed during arbitration are that the issue must be an "open issue," and that resolution of the issue does not violate or conflict with section 251. In this particular case, we find that an alternative dispute resolution procedure is integral to the smooth operation of this agreement, and will lead to the speedy and cost-efficient resolution of disputes.[7]

In support of its decision, the FCC Common Carrier Bureau cited to *US West v. Minnesota Pub. Utils. Comm'n,* 55 F.Supp.2d 968, 986 (D.Minn. 1999)("*US West*"). The Minnesota District Court's decision in *US West*, also supports Staff's position. In a closely analogous situation, the Minnesota District Court rejected US West's argument that the Minnesota PUC did not have the authority to require US West to make available to AT&T Wireless ("AWS") US West's "recording and billing services … to facilitate AWS' collection of termination charges when a third party originates calls that transit US West's network and are then terminated on AWS' network." *US West*, 55 F.Supp. at 985. In reaching its decision the *US West* Court reasoned that:

---

[7] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration In the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission regarding Interconnection Disputes With Verizon Virginia Inc.*, CC Docket No. 00-218; CC Docket No. 00-251, 2003 LEXIS 4821 (Rel. Aug. 29, 2003)("*Virginia Arbitration Decision*"), ¶ 703.

> Section 252(b)(4)(C) expressly provides that a state commission "*shall* resolve *each* issue set forth in the petition and the response." If an issue has been designated by the parties as in need of resolution by the MPUC, the MPUC has an obligation to address that issue and, as was noted above, the parties may raise any issue concerning which they have attempted to negotiate a resolution. The language of § 252(c)(1) stating that the state commission shall ensure that the resolution of open issues meets the requirements of § 251, does not confine the resolution of the issues to the requirements of § 251. If a state commission ensures that the resolution meets the requirements of a section, it is merely certifying that the resolution meets the affirmative requirements of the section while simultaneously determining that it does not conflict with or violate the section's affirmative and negative requirements. Not every issue included in the resolution necessarily involves the affirmative requirements of § 251. Thus, the only limitations that § 252(b)(4)(C) and (c) place upon any individual issue addressed by a state commission during arbitration are that the issue must be: (1) an open issue and (2) that resolution of the issue does not violate or conflict with § 251.
>
> *US West*, 55 F.Supp.2d at 986-87.

Staff finds the FCC Common Carrier Bureau's reasoning in its decision in the *Virginia Arbitration Decision* and the Minnesota federal district court's reasoning in its decision in the *US West* compelling. Like the FCC Common Carrier Bureau's decision in the *Virginia Arbitration Decision* and the Minnesota federal district court's decision in the *US West* case, Staff finds nothing in section 251 prohibiting the Commission from ordering the parties to include in their interconnection agreement *reasonable* terms and conditions governing the parties' arrangements for the billing, collection and settlement of charges for ABS traffic, including the SBC Illinois proposed ABS Appendix or from fashioning its own compromise billing and collection provisions. [8]

c. Conclusion

Staff, in light of the express language of TA 96, the FCC Common Carrier Bureau's *Virginia Arbitration Decision*, the Minnesota District Court's decision in *US*

[8] Of course, the Commission, likewise, would also not be precluded from adopting Sage's position on Sage Issue 1.

West and for the policy reasons articulated by Dr. Zolnierek, recommends that the Commission reject Sage's position on Sage Issue 1.

Sage Issue 2: If the answer to Issue 1 is yes, can SBC impose on Sage an obligation to act as a guarantor to ensure payment to SBC for Incollect charges, which are associated with certain SBC/Third-Party-provided calls, such as collect calls, calling card calls, and third party calls, that are not originated by a Sage customer?

If the Commission requires a billing and collection agreement between Sage and SBC, Sage requests that the Commission approve its proposed language to Article VI, Section 6.3.4.1 (see ¶¶ 26, 31 below). Sage's proposed contract language places Sage in the role of a billing and collection agent only. Sage will make a good faith effort to bill and collect SBC's incollect charges for a per message fee, but should not be financially responsible for SBC's uncollectible incollect charges. SBC, on the other hand, wants to make Sage financially responsible for all incollect charges when the end user fails to pay the charges where SBC or another CLEC (i.e., MCI) is the carrier providing the service to the user.

If the Commission requires a contract for these charges as a precondition to interconnection, Sage respectfully urges the Commission to approve its proposed contract language, which relies on language approved by the Michigan, Wisconsin and Texas commissions and a recent arbitration award from the Texas commission. See, Exhibit 3, a redlined version of the SBC-proposed ABS Appendix.

Summary of Sage Position

Sage argues that SBC Illinois is attempting to force Sage to act as a "guarantor" for uncollectible ABS charges assessed to its end users. "Sage is unwilling to accept any financial responsibility for SBC Illinois' Incollect charges that are uncollectible." Arbitration Petition, ¶18. Sage wants to limit its role, should the Commission hold that billing and collection can be included in an ICA, as a billing and collection agent only, and have only an "obligation to make good faith efforts to bill and collect the Incollect charges…." *Id*. at ¶ 19. In support of its position, Sage argues that as a local carrier, Sage: (1) does not provide the collect call service at issue; (2) does not have any authority over the rates SBC Illinois charges for the collect call service; (3) only learns that a call was placed or accepted via the SBC-provided DUF record and associated rate schedule; (4) invoices its customers based upon the SBC-provided DUF record; (5) has no way of validating the SBC-provided DUF record; and, (6) receives no revenues from the Incollect calls beyond the nominal billing and collection fee. Arbitration Petition, ¶ 22.

Sage also believes SBC Illinois should not seek to change the current business practice with Sage that it uses in Texas. Sage does not want to act as a "guarantor" for the Incollect charges that SBC Illinois imposes for services provided by SBC Illinois. Sage states that it uses billing and collection efforts that are in parity with its own efforts for billing and collection. Sage argues that it should be allowed to recourse all of its uncollectibles back to SBC Illinois if its end user refuses to pay the charges.

Sage proposes alternative language to include in Article VI, Section 6.3.4.1. Specifically, Sage wants to include a statement clarifying Sage's financial obligation for "SBC's ABS traffic: 'CLEC will not be liable for Alternatively Billed Service (ABS)'."

Summary of SBC Illinois' Position

SBC Illinois proposes an ABS Appendix that offers Sage three different options to handle the billing and collection for ABS calls. The SBC Illinois proposed options are:

(1) the ability of Sage to employ full blocking of ABS calls to Sage end users;

(2) the ability of Sage to recourse to SBC Illinois up to 35% of all rated billed ABS messages as uncollectibles, thereby capping Sage's financial responsibility at 65% of the charges for such messages; and

(3) the ability of Sage to purchase ABS Accounts Receivable for a discount of 30% off the value of those Accounts Receivable.

Response to the Arbitration Petition, ¶ 7.

SBC Illinois argues that Sage must bare some financial responsibility, if it is going to allow its end users to receive/accept ABS charges. SBC Illinois contends that Sage has control over whether or not its end user can "authorize and accept ABS calls and associated charges." Response to the Arbitration Petition, ¶ 4. SBC Illinois supports its position by pointing out that because Sage is the carrier that "has the business relationship with its own customers, and which provides the service which allows its customers to accept ABS calls, Sage should have the responsibility to bill and collect the charges authorized and approved by its customers." Response to the Arbitration Petition, ¶ 5.

SBC Illinois believes that Sage does not employ "reasonable billing and collection practices" in accordance with "normal and standard industry business practices that apply to settlement of ABS charges…." Response to the Arbitration Petition, ¶¶ 5-6. SBC Illinois further state that these practices "dictate that each company assumes responsibility for the collect and other ABS calls its end users accept. Burgess Direct (SBC Illinois), at 3. SBC Illinois argues that its request is reasonable because it serves as the billing and collection agent for Sage "when the ABS call flows in SBC Illinois' direction." SBC Illinois, furthermore, does not recourse uncollectible ABS charges to Sage.

Staff's Position

Staff expressed its tentative conclusion in initial testimony that SBC Illinois' proposed three-option approach is the most reasonable choice for the Commission to adopt in this proceeding. Hoagg Direct (Staff Ex. 2.0), at 8.[9] No subsequent arguments or additional evidence have been brought forward since then to alter that conclusion.

Sage witness Ms. Timko, as noted above, frames the "real issue" as "what is Sage's liability if any, when an SBC ABS [Alternatively Billed Services] Customer refuses to pay the charges for SBC's competitive ABS charge." Timko Rebuttal (Sage Ex. 2.0), at 5. Staff expressed this same opinion in initial testimony and agrees with Ms. Timko that the real issue is the respective parties' liabilities for uncollectibles. Hoagg Direct (Staff Ex. 2.0), at 6-7.

Sage's sole position on the issue of respective liability is that it should have no (zero) liability for uncollectibles. Petition for Arbitration, ¶ 18. On the other hand, SBC Illinois' three-option approaches directly address the "real issue" of the respective parties' liability for uncollectibles. SBC Illinois' three-option approach would allow Sage to choose, within limits, the level of financial risk associated with the uncollectible liabilities it wants to accept. Notably, under SBC Illinois' proposed Option 1, Sage can choose to block almost all ABS calls to all of its end user customers by employing Toll Billing Exception ("TBE").[10] Smith Direct (SBC Illinois Ex. 1.0), at 17; Tr. 222-23. Under SBC Illinois' proposed Option 1 Sage's liability for uncollectible ABS calls effectively would be reduced to zero. Under SBC Illinois' proposed Options 2 and 3, moreover, Sage has an effective and costless tool to control the level of uncollectibles via

[9] As adopted by Staff witness Dr. Zolnierek at the evidentiary hearing.
[10] SBC Illinois witness Mr. Smith testified that although "TBE is highly effective as a means of blocking calls, it is not perfect as there is always some 'leakage' with any blocking system." Smith Direct (SBC Illinois Ex. 1.0), at 17. In order to address any "leakage", SBC's Public Communications division will "Selectively Block" calls originating from certain inmate facilities wherein the payphones are equipped to accommodate Selectively Blocked calls. *Id.* Selectively Blocked calls prevents a collect call from being completed to a Sage end user customer unless a pre-paid account is established. *Id.*

"individual blocking" of problem customers that intentionally or unintentionally abuse ABS calls (*i.e.*, make calls or authorize calls but don't pay for them).[11] Tr. 222.

Logically, one must infer from Sage's apparent rejection of SBC Illinois' proposed Option 1 that Sage perceives it realizes some benefit from offering ABS calls to its customers. Sage witness Ms. Timko, in fact, testified that "Sage is not unequivocally opposed to [Option 1]," but expressed concerns regarding the cost of TBE. Timko Rebuttal (Sage Ex. 2.0), at 13. However, on cross-examination, Mr. Smith clarified that SBC does not charge for its block services. Tr. 215-216. Ms. Timko further objected that Option 1 "allows pass through of 3rd-Party ABS for which SBC proposes to hold Sage %100 liable", which "provision is an absolute non-starter for Sage." *Id.* As noted above, however, on the morning of the first scheduled evidentiary hearing for October 22, 2003, SBC Illinois offered Sage a substantive and substantial concession (as reflected in SBC Illinois witnesses Mr. Roman Smith's Revised direct testimony). This concession directly addressed Sage's "non-starter" concerns by removing any Sage liability for the "pass through" of 3rd party LEC calls. Smith Direct (SBC Illinois Ex. 1.0 Revised), at 18. It is Staff's understanding that Sage ultimately rejected SBC Illinois' offer.

Sage also argues that because it has no stake in the ABS revenues (*i.e.*, no claim to the profits) and, in its view, ABS calls are ultimately an SBC Illinois service it should have *no* liability for the uncollectibles. While generally accurate except for its

[11] Under SBC Illinois' proposed Option 2, Sage will be allowed to recourse up to 35% of uncollectible Incollects back to SBC. This proposed "cap" is imposed only after all unbillables are removed from the DUF.[11] Under Option 3, again after removing unbillables, will allow Sage to purchase ABS accounts receivables at a discount of 30%.

conclusion, such arguments ignore the fundamental fact that it is Sage customers[12] that authorize ABS calls over the Sage (UNE-P leased) network. If Sage were to accept Option 1, Staff would have no public policy objection, and Issue 2 effectively would be resolved. Under this circumstance, any Sage customer seeking ABS calling functionality could switch to another ILEC offering such capabilities.

In Staff's view, it seems clear that if Sage customers authorize an ABS call, they should pay for it. Sage, moreover, should bill and collect for these calls for several reasons. First, Staff witness Mr. Hoagg testified that Sage, not SBC Illinois, has the existing business relationship with the Sage end-user customer. Hoagg Direct (Staff Ex. 2.0), at 7. Sage already bills its customers for its local service. Sage, moreover, already has accepted section 27.16 of the ICA that requires Sage to do the billing and collection for ABS calls. Timko Rebuttal (Sage Ex. 2.0), at 3. Staff witness Mr. Hoagg testified that "it is in the public interest that Sage perform such billing for SBC (and vice-versa if Sage were to seek it)." Hoagg Direct (Staff Ex. 2.0), at 7. The alternative, according to Mr. Hoagg, of direct billing of Sage customers by SBC "appears considerably less desirable." *Id.* All else being equal, Mr. Hoagg continued, "consumers almost certainly prefer fewer, rather than more, telephone bills." *Id*. Sage end user customers, moreover, in many, if not most, cases are former SBC Illinois customers. Smith Direct (SBC Illinois Ex. 1.0), at 14. If SBC Illinois were to directly bill Sage end user customers while Sage continues to bill for local service, former SBC Illinois customers could be confused as they could reasonably expect to not receive bills from SBC Illinois after they left SBC Illinois. Staff witness Mr. Hoagg, consequently, testified

[12] These are customers of Sage's local, toll and long distance services provided over the UNE-P network leased from SBC. Timko Direct (Sage Ex. 1.0), at 6.

that, "[a]s a general matter, I believe it is desirable for customer contacts to be generated by and confined to the customer's carrier to the greatest extent possible." Hoagg Direct (Staff Ex. 2.0), at 7.

Further supporting Staff's position is the fact that Sage's track record of collecting for ABS calls falls short of adequate. SBC Illinois witness Mr. Smith described the amounts that Sage recourses back to SBC (in the states Sage is already doing business in) as "well above and far exceeding the industry average." Smith Direct (SBC Illinois Ex. 1.0), at 19. SBC Illinois witness Ms. Burgess testified that in some states Sage's uncollectibles for ABS calls were as high as 50 to 95%. Burgess Direct (SBC Illinois Ex. 2.0P), at 12. This strongly suggests that under the ABS billing practices utilized by Sage in other states, it apparently has insufficient financial incentive to effectively pursue collection of ABS-associated charges (and thus minimize uncollectibles for such calls).

Sage witness Ms. Timko essentially acknowledged that Sage's collection efforts for ABS calls were inadequate. Ms. Timko, in fact, on cross-examination testified that: "Sage's collection efforts in general for our active customers aren't strong. I mean, there aren't a lot of people."[13] Tr. At 293. Ms. Timko further testified that Sage sends out its ABS bills separate from the bills it sends out for its local service. Tr.287-88. Ms Timko also testified that while Sage makes follow-up calls to customers that are behind in paying their local phone bills, Sage makes no such follow-up phone calls to its customers that are behind in paying their ABS bills. Tr. 291-92, 296-97. Ms. Timko, moreover, stated that when setting up a new account for Sage customers "Sage does

---

[13] Ms. Timko testified that once an incollect has gone past a "certain date," the bill "goes to a final bill status, which is then sent to a completely different collection group."

not take any steps to ensure that the new customer is likely to pay charges for ABS services". TR. 298.

The record evidence noted above suggests that by employing stronger collection efforts Sage could very likely recourse far less than 30-35% of the face value of ABS calls. For example, SBC Illinois witnesses Mr. Smith indicated that it was his understanding that the industry average uncollectible rate for ABS calls is in the range of 15-20%. Smith Direct (SBC Illinois Ex. 1.0), at 19. More pointedly, SBC Illinois witness Ms. Burgess indicates that "SBC incurs between 10 and 20% bad debt when looking at just ABS call on its own end user bills." Burgess Direct (SBC Illinois Ex. 2.0P), at 13. The evidence in whole indicates that it is possible for Sage to, when sufficiently diligent collection methods are used, recover in excess of 65-70% of ABS billings.

If Sage were merely seeking to avoid providing ABS service, it has the means to accomplish this objective. Sage and SBC have agreed upon terms and conditions that would permit Sage to block ABS service. Tr. at 21 - 22. Sage, however, accepts these terms only if can obtain additional terms and conditions it proposes that would allow Sage customers to take advantage of ABS service. Tr. at 21. In fact, in its Petition for Arbitration, Sage argues the parties should adopt the "the standard business practice" that Sage has adopted all ten states in which it currently operates. Petition for Arbitration, at ¶ 25. Ms. Burgess, however, as noted above, indicates that Sage has recoursed between 50 and 95% of ABS calls in those states. Burgess Direct (SBC Illinois Ex. 2.0P), at 12. In Staff's view, based upon the record evidence, the Commission can only conclude that Sage's proposal (that it be free to recourse to SBC

Illinois all ABS billing for which it does not collect) simply provides no incentive for Sage to pursue reasonable collection efforts. Staff recommends against Sage's proposal, because it does not comport with sound public telecommunications policy.

Sage, and Sage alone, has the ability to block ABS service to its customers. Sage may elect to do so. In Staff's view, by electing not to block and employing lax collection methods, Sage is, in effect, complicit in letting ABS customers evade payments for ABS services. Such behavior is inequitable to the providers of ABS services, and equally inequitable to those ABS customers that do pay their ABS bills. Further, if the Commission expressly approves of such behavior, then it has a higher probability of being adopted by other carriers. Sage's approach, to the extent that it results in ABS calls being authorized but never paid for, could ultimately culminate in the demise of ABS service in Illinois. The risk of such a loss appears needless in light of the fact that the evidence in this case suggests that the benefits of ABS services can be offered by Sage to its customers, through one of SBC Illinois' proposed three option approach, with little to no financial exposure to Sage.

In conclusion, Staff, for all of the reasons articulated above, recommends that the Commission reject Sage's position on Sage Issue 2.

SBC Issue 1: Sections 29.3, "Amendment on Other Changes to the Act; Reservation of Rights," and 29.4, "Regulatory changes of the ICA," as set forth in Exhibit 2 to Sage's Petition, should be replaced with the language included in Attachment 1 to this Response.

SBC Illinois raised this issue in its Response to Sage's Petition for Arbitration (see pp. 5-7, and Att. 1) filed on October 10, 2003. In its Rebuttal Testimony, filed on October 21, 2003, Sage did not address SBC Issue 1. It is clear from the evidentiary hearing (Tr. 217-219) that Staff has certain concerns regarding the language that appears to be SBC Illinois' interpretation of federal law. *See* SBC's Response to Sage's Petition for Arbitration, Att. 1. Staff, however, does not believe that it is appropriate to make a recommendation regarding this language to the Commission without knowing what the parties intended. Furthermore, neither party has clearly articulated their respective positions regarding the import of the proposed language.

Staff, consequently, will wait to see Sage's position regarding SBC Issue 1 in its Initial Brief, rather than speculating on what Sage's position might be. If Sage were to accept SBC Illinois' proposed intervening law language as a negotiated provision of the ICA, then Staff would have no objection to this part of the "agreed to" ICA. If, on the other hand, Sage were to take issue with SBC Illinois' interpretation of federal law in the proposed intervening law provision, Staff will voice its concerns and recommendation. Staff, accordingly, reserves the right to fully address this issue in its Reply Brief, if warranted.

II. CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in this proceeding.

Respectfully submitted,

Illinois Commerce Commission Staff

By: /s/______________________________
One of its attorneys

Brandy D.B. Brown
Michael J. Lannon
Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877
(312) 793-1556 (Fax)

Counsel for Staff of the
Illinois Commerce Commission

Date: November 3, 2003